Sim Khoo Tneah Seng & Anor v Majlis Perbandaran Pulau Pinang and other appeals

PLANNING APPEAL BOARD (PULAU PINANG) — APPEAL NO LR/PP/11 OF 2012
YEO YANG POH CH, AMIRUDDIN FAWZI BAHAUDIN AND SAN MARKAN GANAPATHI
20 NOVEMBER 2015

Local Government — Town planning — Application for planning permission — Respondent granted planning applicant's application for planning permission — Whether planning applicant's proposed development qualified as 'special project' and for 'limited development' — Whether state planning committee's permission was required for proposed development — Whether 'Wednesbury reasobableness test' fulfilled — Town and Country Planning Act 1976 s 25

Sunway City (Penang) Sdn Bhd, the planning applicant, had applied for planning permission to develop its land ('the said land') into a residential development. The owners of the neighbouring lands ('the appellants') had objected to the planning application nevertheless the respondent had allowed the same, hence the present appeals. The planning applicant argued that despite the said land being 'hill land' and located in a 'sensitive area', the planning permission was properly granted because the proposed development was a 'special project' as stated under section 4.5.2, DK3 L4 of the Penang Structure Plan 2020 ('the plan'). The planning applicant also referred to para b(iv), category 2(c), ('the third sub-para') of the 'Garispanduan Projek Istimewa Yang Dikenalpasti Di dalam Rancangan Struktur Negeri Pulau Pinang 2020' ('the SP guidelines') which provided the categories of 'special project'. They argued that the application fell under the third sub-paragraph based on the facts that under the Master Plan of 1996, the said land was designated or zoned for 'perumahan am' and 'perumahan bertumpatan rendah'. Further, both the planning applicant and the respondent contended that a direct approval from the state planning committee ('the SPC') was not necessary as the SPC had delegated to the respondent the task of exercising the discretion to grant or refuse the same. On the other hand, the appellant submitted that the said land was unsuitable for the development applied for and that the project would adversely affect the surrounding areas in a substantial way.

Held, allowing the appeals and setting aside the planning permission granted by the respondent with no order as to costs:

(1) The third sub-para must be read with the first sub-paragraph. To qualify under 'category 2', the right to development must have been crystallised or vested before 28 June 2007 ie the date the plan came into being. There must be an application for 'tukar syarat' that had already been approved before the inception of the plan. In the present case, there was none. The planning applicant could not invoke the third sub-paragraph in isolation of the other sub-paragraphs under 'category 2'. In the present case, no right to housing development had been crystallised, or vested in it. Zoning was different from 'tukar syarat', it was just a planning indicator (see para 18).

(2) Section 25 of the Town and Country Planning Act 1976 stated that even acquired rights, in planning law, can be revoked or modified, if there are cogent planning reasons of important public interest for the planning authority to do so. Applying the purposive-approach test on the provision, the board satisfied that it served to promote the intent and purpose of the SP guidelines, which confirms its correctness. Thus, the planning applicant's proposed development did not qualify as a 'special project' under the SP guidelines and under DK3 L4 (see paras 19–20).

(3) Even if, for the sake of argument, the planning applicant's proposed development could be considered a 'special project', DK3 L4 only allows 'limited development' in the case of 'special project'. In the present case, the planning applicant's intention to build 600 dwellings could hardly be termed 'limited development' (see para 21).

(4) The delegation of power with the total absence of any supervisory control by the SPC was invalid. The delegation could not be 'saved' by the Carltona principle because the factor of necessity, practicality and inevitability was absent. Firstly, unlike in the case of a Minister, the SPC is not an authority that deals with so many matters that it has, out of necessity, to 'devolve' some of its powers, in order to ensure the efficient functioning of the committee. Secondly, 'special project' being an exception to the rule was by their nature rare or infrequent, compared with 'ordinary projects'. There was no reason of necessity for delegating or devolving the power to decide on rare cases that would not frequently occur (see paras 26–27).

(5) Based on all the above aspects, the respondent, in granting the planning permission had failed the 'Wednesbury reasonableness test'. Consequently, the grant of the planning permission could not be sustained (see para 28).

[Bahasa Malaysia summary

Sunway City (Penang) Sdn Bhd, pemohon perancangan, telah memohon kebenaran perancangan untuk membangunkan tanahnya ('tanah yang tersebut') kepada pembangunan perumahan. Pemilik tanah yang bersebelahan

('perayu') telah membantah permohonan perancangan itu namun pihak responden telah memberikan kebenaran, maka rayuan ini. Pemohon perancangan menghujahkan bahawa meskipun tanah yang tersebut merupakan 'tanah berbukit' dan terletak di tempat yang sensitif, kebenaran perancangan itu telah diluluskan secara teratur kerana pembangunan yang dicadangkan itu merupakan suatu 'projek istimewa' sebagaimana yang dinyatakan di bawah seksyen 4.5.2, DK3 L4 Rancangan Struktur Pulau Pinang 2020 ('pelan'). Pemohon perancangan juga telah merujuk kepada perenggan b(iv), kategori 2(c), ('sub-perenggan ketiga') 'Garispanduan Projek Istimewa Yang Dikenalpasti Di dalam Rancangan Struktur Negeri Pulau Pinang 2020' ('garis panduan SP') yang memperuntukkan kategori 'projek istimewa'. Mereka menghujahkan bahawa permohonan itu jatuh di bawah sub-perenggan ketiga berdasarkan kepada fakta bahawa di bawah Rancangan Induk 1996, tanah itu telah ditetapkan atau dizonkan sebagai perumahan am dan perumahan bertumpatan rendah. Selanjutnya, kedua-dua pemohon dan responden menyatakan bahawa kebenaran secara langsung daripada Jawatankuasa Perancangan Negeri ('JPN') tidak diperlukan kerana pihak JPN telah memberikan kepada responden tugas untuk melaksanakan budi bicara sama ada untuk meluluskan atau menolak permohonan. Selain itu, pihak perayu turut menghujahkan bahawa tanah yang tersebut tidak sesuai untuk pembangunan yang dipohonkan dan projek itu akan memberi kesan yang amat ketara kepada kawasan sekitar.

Diputuskan, membenarkan rayuan dan mengenepikan kebenaran perancangan yang diluluskan oleh responden tanpa perintah mengenai kos:

(1) Sub-perenggan ketiga hendaklah dibaca bersama dengan sub-perenggan pertama. Untuk layak dikategorikan di bawah kategori 2, pembangunan yang betul hendaklah telah dijelaskan atau diletakhakkan sebelum 28 Jun 2007 iaitu tarikh rancangan itu dizahirkan. Semestinya sudah ada suatu permohonan 'tukar syarat' yang telah diluluskan sebelum rancangan itu dimulakan. Dalam kes ini, tidak ada. Pemohon perancangan tidak boleh menggunakan sub-perenggan ketiga secara terasing daripada sub-perenggan yang lain di bawah kategori 2. Dalam kes ini, tiada hak kepada pembangunan perumahan telah dijelaskan, atau diletakhakkan. Pengezonan adalah berbeza daripada 'tukar syarat', ia hanyalah suatu penunjuk perancangan (lihat perenggan 18).

(2) Seksyen 25 Akta Perancangan Bandar dan Desa 1976 menyatakan bahawa hak yang diperolehi pun, dalam undang-undang perancangan, boleh dibatalkan atau diubah, jika terdapat sebab-sebab perancangan yang meyakinkan yang berkepentingan awam yang mustahak bagi pihak berkuasa perancangan melaksanakannya. Dengan menggunakan ujian pendekatan tujuan ke atas peruntukan itu, lembaga berpuas hati bahawa ia berfungsi untuk mempromosikan tujuan dan matlamat garis panduan SP itu, yang mengesahkan kebenarannya. Maka, pembangunan yang

dicadangkan oleh pemohon perancangan itu tidak layak dikira sebagai projek istimewa di bawah garis panduan SP dan di bawah DK3 L4 (lihat perenggan 19–20).

(3) Jika pun, demi untuk penghujahan, pembangunan yang dicadangkan oleh pemohon perancangan boleh dianggap sebagai suatu 'projek istimewa', DK3 L4 hanya membenarkan pembangunan terhad dalam kes 'projek istimewa'. Dalam kes ini, niat pemohon perancangan untuk membina 600 tempat kediaman tidak boleh dikatakan sebagai 'pembangunan terhad' (lihat perenggan 21).

(4) Pewakilan kuasa dengan ketiadaan apa-apa kawalan pemantauan oleh JPN adalah tidak sah. Pewakilan itu tidak boleh diselamatkan dengan prinsip Carltona kerana faktor keperluan, praktikal dan ketakbolehelakkan tidak wujud. Pertamanya, berlainan dengan kes seorang Menteri, JPN bukanlah pihak berkuasa yang menguruskan pelbagai perkara sehingga ia perlu, disebabkan oleh keperluan, untuk menurunkan kuasanya yang tertentu, untuk memastikan jawatankuasa berfungsi dengan baik. Keduanya, 'projek istimewa' yang menjadi pengecualian kepada kaedah dengan sendirinya bersifat jarang atau tidak kerap, berbanding dengan 'projek biasa'. Tidak terdapat apa-apa keperluan untuk mewakilkan atau menurunkan kuasa untuk membuat keputusan dalam kes-kes luar biasa yang tidak kerap berlaku (lihat perenggan 26–27).

(5) Berdasarkan kepada kesemua aspek di atas, pihak responden, dalam meluluskan kebenaran perancangan telah gagal menjalankan ujian 'Wednesbury reasonableness test'. Akibatnya, kelulusan kebenaran perancangan itu tidak boleh dikekalkan (lihat perenggan 28).]

Notes

For cases on application for planning permission, see 10(1) *Mallal's Digest* (5th Ed, 2015) paras 214–225.

Cases referred to

Madlis bin Azid @ Aziz v Board of Officers & Ors [2015] 5 MLJ 844; [2015] 3 CLJ 168, CA (refd)

Legislation referred to

Interpretation Acts 1948 and 1967 s 17A
Land Conservation Act 1960
Town and Country Planning Act 1976 s 21(8)

Lakhbir Singh (Lakhbir Singh Chahl & Co) for the appellants.
Shamiah (Legal Officer, City Council of Penang Island) for the respondent.
Christina Siew (Lim Kean Siew & Co) for the planing applicant.

Yeo Yang Poh Ch:

[1] This appeal was heard, by consent of all parties involved, together with five other appeals, namely Appeals Nos LR/PP/9 of 2012, LR/PP/10 of 2012, LR/PP/12 of 2012, LR/PP/13 of 2012 and LR/PP/15 of 2012; since all these appeals arise out of the same set of facts. Another three appeals (namely Appeals Nos LR/PP/6 of 2012; LR/PP/7 of 2012 and LR/PP/8 of 2012) were, with the concurrence of the parties there, put on hold pending the outcome of this appeal; because the outcome here will determine how those three appeals are to be either similarly decided, or otherwise proceeded with.

BRIEF FACTS

[2] Sunway City (Penang) Sdn Bhd ('the planing applicant') owns a piece of land measuring about 80.9 acres, held under Hakmilik 81977 Lot 14345, Mk 12, Daerah Barat Daya ('the said land'). On or about 23 March 2011, it applied for planning permission to develop the said land into a residential development that will comprise a total of 600 dwelling units of different types, made up of three-storey detached houses, condominiums of various heights, and a three-storey clubhouse. The exact components of each type of dwelling proposed to be built are not vital to the determination of this appeal; and so need not be set out in precise details here.

[3] The appellants in this case, and those in the other related appeals, are owners of 'neighbouring lands' (as defined in s 21(8) of the Town and Country Planning Act 1976 ('the Act')). They had objected to the planning application.

[4] On or about 21 February 2012, the respondent allowed the planning application, and granted planning permission for the proposed residential project (subject to some usual conditions). The appellants were notified of the approval, whereupon they filed the present appeal. So did the appellants in the other appeals.

[5] As will be explained shortly, in terms of planning the said land is a 'hill land'; because it is situated at an elevation of more than 76 metres (250 ft) above sea level. About 43% of the said land has a gradient exceeding 25 degrees, which renders those portions 'hill land' that is situated in a 'sensitive area' ('kawasan berisiko'). These facts are undisputed.

The planing applicant maintains that, despite it being 'hill land' and located in a 'sensitive area', the planning permission was properly granted; because the proposed development is a 'special project' or *'projek istimewa'*. On the other hand, the appellants contend that the said land is *unsuitable for the development*

applied for; and that the project (if proceeded with) would adversely affect the surrounding areas in a substantial way.

DEVELOPMENT OF 'HILL LANDS'

[6] The *'Rancangan Struktur Negeri Pulau Pinang 2020'* ('Penang Structure Plan 2020') came into being on 28 June 2007. Its section 4.5.2 contains provisions pertaining to hill lands (*'tanah bukit'*) on the Penang island; which it sees as being increasingly threatened (*'semakin terancam'*). Section 4.5.2 describes 'hill lands' as lands situated more than 250 feet (76 metres) above sea level; and it provides guidelines for the preservation of hill lands in order to maintain ecological balance (*'kesimbangan ekologi'*).

[7] The said land, admittedly, falls within the description of 'hill land' under section 4.5.2. That section contains nine provisions, from para 'DK3 L1' to para 'DK3 L9'.

[8] The first 5 provisions under section 4.5.2 are pertinent to this appeal:

(a) DK3 L1 prescribes a *general preservation* of hill lands, including lands *gazetted* under the Land Conservation Act 1960 ('the LCA').

The latter class of hill lands are, of course, subject further to the provisions in the LCA.

I pause to emphasise that the hill lands sought to be preserved under DK3 L1 *include* (but are not limited to) lands that are *gazetted* under the LCA. DK3 L1 does not confine or define 'hill lands' to mean only those lands that are *gazetted* under the LCA.

(b) DK3 L2 contains a *general prohibition* against any form of development (including housing development) on the following types of land:

(i) lands *gazetted* under the LCA;

(ii) any land situated at more than 76m (250 feet) above sea level (ie hill lands); and

(iii) lands with a slope or gradient of more than 25 degrees (ie lands within a 'sensitive area').

(c) DK3 L3 provides that lands that are 'removed' or 'excised' from being *gazetted* under the LCA will be subject to the 'guidelines on risky or sensitive areas' (*'garis panduan Kawasan Berisiko'*) applicable in the State of Pulau Pinang;

(d) DK3 L4 provides an exception to the general prohibition of development on hill lands. As the planing applicant relies heavily on this

provision; I will set it out in its entirety below (Emphasis added):

> Pembangunan *secara terhad* bagi *projek istimewa* di kawasan aras tanah ketinggian 76m (250 kaki) atau lebih memerlukan *kawalan ketat* dengan mematuhi garispanduan pembangunan kawasan tanah tinggi dan mana-mana garispanduan yang ditetapkan oleh kerajaan, dan mendapat kelulusan EIA serta mendapat kelulusan Jawatankuasa Perancang Negeri.

(e) DK3 L5 stipulates that any development on lands with gradient steeper than 25 degrees (whether or not it is hill land or land gazetted under the LCA) will be subject to the requirements of the guidelines on *'Kawasan Berisiko'* applicable in the State of Penang.

[9] From DK3 L1 and DK3 L2; the following can be deduced (and indeed they are not disputed by the planing applicant):

(a) hill lands, including the said land, are generally to be preserved;

(b) all forms of development on hill lands (including the said land), and on lands *gazetted* under the LCA, are generally prohibited; and

(c) development is also generally prohibited on lands with a gradient of more than 25 degrees (of which the said land is also one).

[10] The crux of the planing applicant's argument therefore lies in DK3 L4 (set out in para 8(d) above). The planing applicant says that its proposed development is a 'special project' (*'projek istimewa'*); and it is thus permissible under DK3 L4. Hence, we must examine DK3 L4 closely. That exercise turns up the following:

(a) limited development (*'pembangunan secara terhad'*) may be allowed for 'special projects' (*'projek istimewa'*) on hill lands;

(b) there is no description or explanation, in DK3 L4, of what may amount to a 'special project' in the context of hill lands; nor what is meant by 'limited development'. However, I agree with the planing applicant that DK3 L4 needs to be read together with the *'Garispanduan Projek Istimewa Yang Dikenalpasti Di dalam Rancangan Struktur Negeri Pulau Pinang 2020'* ('SP guidelines') which was approved by the state planning committee (*'Jawatankuasa Perancang Negeri'*) ('the SPC') on 21 May 2009; and

(c) such a 'special project' (whatever it may mean, which we shall soon discuss) must be subject to tight control *('kawalan ketat')*, must comply with all applicable guidelines, must have approval regarding its EIA (environmental impact assessment), and *must also have approval from the SPC*.

[11] In the circumstances of this case, the planing applicant must be able to meet several requirements, in order to successfully invoke DK3 L4. The first is to ascertain what is meant by 'special projects', and whether the planing applicant's proposed development qualifies as one. DK3 L4 offers no help in this quest; for it is completely silent on what could amount to a 'special project'.

[12] One thing, however, is clear. *A 'special project' cannot simply be what the SPC (or the respondent) per se says it is, without more*. If a development becomes a 'special project' just because the SPC (or the respondent) calls it such; that would be the height of arbitrariness, and the demise of Wednesbury reasonableness.

PURPOSIVE CONSTRUCTION

[13] Statutes are to be purposively construed — see s 17A of the Interpretation Acts 1948 and 1967. A provision shall also, as far as possible, be interpreted harmoniously with other provisions in a statute — see eg *Madlis bin Azid @ Aziz v Board of Officers & Ors* [2015] 5 MLJ 844 at p 856; [2015] 3 CLJ 168 at p 183. In my view, the same principles of construction should, *a fortiori*, apply to subsidiary legislations, rules, regulations, and non-statutory guidelines. The case for *non-statutory planning guidelines* to be purposively construed is even stronger; not least because they are not drafted with the same degree of experienced linguistic precision as in the case of a statute, but also because they are obviously meant to be a servant to (and not a master of) the overarching objective of sensible planning, which is a matter subject to swifter purposive changes with the evolving requirements of the times than most other areas of societal evolution.

[14] The phrase 'special project', when purposively construed in the context of DK3 L4 and section 4.5.2 under the Penang Structure Plan 2020, must mean a project that possesses features which can set it apart from other (usually commercial) projects; so that it becomes 'special' enough (vis-à-vis planning considerations) to warrant casting aside or modifying the overall intention of preserving hill lands, which intention forms the backbone of section 4.5.2 of the Penang Structure Plan 2020.

[15] We must then turn to the SP guidelines to see what may constitute 'special projects'. Paragraph b(iv) of the SP guidelines, in which lies the crux of the planing applicant's arguments, sets out two categories of 'special projects'; the material parts of which are reproduced below:

> Kategori 1
>
> (a) *Projek-projek infrastruktur utama* berkepentingan Kerajaan, untuk *kegunaan awam* ...

(b) Projek-projek istimewa yang dimaksudkan adalah meliputi:-

(i) Projek kereta kabel;

(ii) Projek keretapi bukit;

...

...

(vii) Apa-apa projek infrastruktur lain berkepentingan Kerajaan dan untuk kegunaan awam yang *tidak dapat dielakkan* untuk tidak dibina di kawasan yang dimaksudkan.

Kategori 2

(a) *Pembangunan perumahan terdahulu di mana permohonan tukar syarat* tapak kawasan berkenaan *telah diluluskan* di bawah perundangan Negeri bagi tujuan perumahan *dan* kelulusan tersebut *telah disahkan sebelum kelulusan dan penerimapakaian RSNPP 2020* (ie the Penang Structure Plan 2020);

(b) *Antaranya termasuk* projek pembangunan yang *pernah mendapat kelulusan kebenaran merancang atau*;

(c) Tapak yang ditunjukkan sebagai *kawasan perumahan mengikut Pelan Dasar* Perancangan dan Kawalan Pemajuan MPPP (sehingga RT diwartakan). (Emphasis added.)

[16] These two categories of 'special projects' must be properly read in the context of the entire SP Guidelines, and also be read harmoniously with the other provisions in that document; including its para a(x) which throws further light on the reasoning behind the creation of exceptions to the preservation of hill lands. When so read, I am of the view that the following could be reasonably and purposively construed from it:

(a) the first category of exceptions concern infrastructure projects executed for public purpose. The rationale for making this category of developments an exception is easy to see;

(b) the second category of exceptions concern *previously approved housing projects* ('*pembangunan perumahan terdahulu*') — ie projects where an application for the change of land use ('*di mana permohonan tukar syarat*') of the plot concerned had already been approved before the coming into being of the Penang Structure Plan 2020. The rationale for 'category 2' is also evident and reasonable — it preserves rights that had already been *crystallised and vested* in landowners and developers prior to the inception of the Penang Structure Plan 2020; and

(c) 'category 2' has three sub-paragraphs — all of them stemming from the same root. Its second and third sub-paragraphs do not constitute a different category (or categories) — they are illustrations of the same 'category 2' as described in the first sub-paragraph. The use of the words

'antaranya termasuk' and *'atau'* are instructive in this regard. If the third sub-paragraph in 'category 2' is intended to create a separate class of exceptions, it would have been placed under a 'category 3'.

[17] 'Category 1' obviously has no application to our case. The contention of the planing applicant is that its application falls under the third sub-paragraph of 'category 2'. It points out that, under the 'Master Plan' (*'Pelan Dasar'*) of 1996, the land in question was designated or 'zoned' for *'perumahan am'* and *'perumahan bertumpatan rendah'*. Based on that alone, the planing applicant argues that it satisfies the criterion stated in that sub-paragraph.

[18] The planing applicant might have a point, if the third sub-paragraph of 'category 2' can be treated as a stand-alone provision that constitutes a separate class of exceptions. But, as I have explained earlier, it is not. That third sub-paragraph must be read with the first sub-paragraph. To qualify under 'category 2', the right to development must have been crystallised or vested before 28 June 2007. There must be an application for *'tukar syarat'* that had already been approved before the inception (in 2007) of the Penang Structure Plan 2020. In this case, there is none. Therefore, the planing applicant cannot invoke the third sub-paragraph in isolation of the other sub-paragraphs under 'category 2'; and claim to be home and dry. No right to housing development had been crystallised, or vested in it. Zoning or designation of purpose for a piece of land is not something cast in stone. Zoning is different from *'tukar syarat'*. It is just a planning indicator.

[19] Moreover, s 25 of the Act reminds us that even acquired rights, in planning law, can be revoked or modified; if there are cogent planning reasons of important public interest for the planning authority to do so.

[20] Putting the above construction to the purposive-approach test, I am satisfied that it serves to promote the intent and purpose of the SP guidelines, which confirms its correctness. I therefore hold that the planing applicant's proposed development in this case does not qualify as a 'special project' under the SP guidelines and under DK3 L4.

'LIMITED DEVELOPMENT'

[21] Even if, for the sake of argument, the planing applicant's proposed development can be considered a 'special project'; DK3 L4 only allows limited development (*'pembangunan secara terhad'*) in the case of a 'special project'. While DK3 L4 again fails to make clear the precise ambit of what could constitute a 'limited development'; the planing applicant's intention to build 600 dwellings (some of which will be housed in condominiums varying from five to 16 storeys tall) can hardly be termed 'limited development'. This is

another reason why, in my view, the respondent had not correctly applied its mind regarding the planning application in question; and why the grant of planning permission was not proper.

DELEGATION OF DISCRETION

[22] DK3 L4 further stipulates the necessity for a planning applicant to procure several approvals, before a development may be regarded as a 'special project'. One of the requirements is the procurement of the approval of the SPC ('*serta mendapat kelulusan Jawatankuasa Perancang Negeri*').

A decision to grant or refuse such an approval will necessarily involve the judicious exercise of discretion on the part of the SPC; after having considered sufficient materials placed before it, and having regard to the spirit and intent of the empowering document (which, as we have seen, is generally one of *preservation* of hill lands).

The following passages from two case-authorities are instructive in this aspect:

> It is trite law that before a discretion can be exercised, *sufficient materials* must be placed before the decision-maker to enable him to exercise the discretion. ... a discretion must be exercised judicially and within the limits and *in the spirit of the legislation concerned*...
>
> ... [it] is to be done according to the *rules of reason and justice, and not according to private opinion* ... according to law, and not humour. It is to be, not arbitrary, vague, but legal and regular ...
>
> ... A discretion is to be 'regulated according to known rules of law' ... and not the mere whim or caprice of the person to whom it is entrusted ... (see *Cooperative Central Bank Ltd v Tan Nyap How* [1997] 4 MLJ 568 at p 574). (Emphasis added.)
>
> ... discretion must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it, it will be reviewed (see *Soonfroze Corp Sdn Bhd v Siti Salabiah bte Chek Hassan & Ors* [2003] 5 MLJ 361; [2003] 2 AMR 427 at p 444).

[23] There lies the third hurdle to be crossed by the planing applicant; putting aside for the time being its failure to overcome the other two hurdles. Neither the respondent nor the planing applicant is able to show any approval given by the SPC for the proposed development. What they both say is that a direct approval was not necessary, because the SPC had delegated to the respondent the task of exercising the discretion to grant or refuse the same.

[24] Their basis for saying so is para c(i) of the SP Guidelines, which provides that: *'semua permohonan kebenaran merancang di bawah kategori 1 dan 2 tidak perlu lagi dirujuk kepada Jawatankuasa Perancang Negeri bagi mempercepatkan*

pertimbangan permohonan'. From this paragraph, they argue that the respondent could decide that a development was a 'special project' and grant it approval, without having to refer the planning application to the SPC.

[25] The difficulty with this argument is that, generally speaking, the exercise of a discretion is non-delegable. From paras 5–158 to 5–179 in the (7th Ed) of *De Smith's Judicial Review*, the following principles relating to the delegation of the exercise of discretion can be culled:

(a) 'Where an authority vested with discretionary powers empowers one of its committees or subcommittees, members or officers to exercise those powers independently without any supervisory control by the authority itself, the exercise of the powers is likely to be held invalid' (see para 5–159);

(b) 'The degree of control (before or afterwards) maintained by the delegating authority over the acts of the delegate or sub-delegate may be a material factor in determining the validity of the delegation' (see para 5–160); and

(c) the *Carltona* principle, which allows 'devolvement' of power rather than 'delegation' of power; is one born of necessity, practicality, and inevitability (see para 5–172). Government machinery will not work if, for example, a Minister is required to personally consider all matters coming under his ministry and to personally make each and every decision therefor.

[26] In our case, it is contended that the respondent has been delegated with the power to decide the matter without having to refer it to the SPC; or, in other words, without the SPC even knowing about it. That would mean the total absence of any supervisory control by the SPC. In my view, adopting the opinion of the learned authors of *De Smith's Judicial Review*, such delegation is invalid. This view is fortified by the following judicial statement:

> It is a principle of long standing that a body charged with exercising discretion in the making of decisions must not, by its own act or decision, prevent itself from exercising that discretion properly (see *Liow Tow Thong v Pentadbir Tanah Alor Gajah* [1998] 1 MLJ 79 at p 86).

The effect of saying that the respondent could decide without informing or referring the matter to the SPC is that the SPC does indeed 'prevent itself from exercising that discretion properly'; since one is obviously prevented from exercising one's discretion in a matter if that matter is not referred to one in the first place.

[27] In the circumstances of our case, the purported delegation found in para c(i) of the SP guidelines cannot be 'saved' by the *Carltona* principle; because the factor of necessity, practicality and inevitability is absent. Firstly, unlike in the case of a Minister, the SPC is not an authority that deals with so many matters that it has, out of necessity, to 'devolve' some of its powers, in order to ensure the efficient functioning of the committee. Secondly, 'special projects' being an exception to the rule are by their nature rare or infrequent, compared with 'ordinary projects'. There is no reason of necessity for delegating or devolving the power to decide on rare cases that would not frequently occur.

SUMMARY

[28] Based on the above, I find that the respondent, in granting the planning permission in this case, had failed the 'Wednesbury reasonableness test'; in the following aspects:

(a) the respondent had failed to give proper or adequate consideration to section 4.5.2 of the Penang Structure Plan 2020, including its primary objective of preserving 'hill lands', subject only to limited and justifiable exceptions described as 'special projects';

(b) the respondent had misconstrued the nature and ambit of 'category 2' of 'special projects' under the SP Guidelines; and consequently had treated the proposed development as a 'special project' when there was no sound reason to regard it as one;

(c) the respondent had not properly and adequately considered that, even in the case of a 'special project', only 'limited development' can be permitted (which the proposed project cannot be described as one); and

(d) the respondent had decided that the proposed development qualified as a 'special project', without reference to the SPC, under a belief that the power to so decide had been delegated to it. That delegation of power, however, is invalid.

As a result, the grant of the planning permission in this case cannot be sustained.

[29] Lest I be misunderstood, it should be made clear that the board is not saying that the Penang Structure Plan 2020 must always be followed religiously or with zero flexibility; or that (apart from 'special projects') all 'hill lands' can never be developed however exceptional the circumstances of a case may be.

What I do hold is that it would require very strong justification to permit limited development of 'hill lands'; which justification is lacking in this instance.

ENVIRONMENTAL IMPACT ASSESSMENT ('EIA')

[30] The appellants have also mounted arguments against the approval of the proposed project, on grounds of adverse environmental impact. They do so by criticising or pointing out certain aspects of the EIA report submitted by the planing applicant. They did not produce any EIA report of their own; or call any expert witness to contradict the planing applicant's report.

[31] Since the appellants have succeeded in this appeal for the reasons explained in the foregoing paragraphs, it has become unnecessary for me to deal with the issues of adverse environmental impact raised by them. The same goes for the other secondary issues canvassed by the appellants at the hearing and in their written submissions.

CONCLUSION

[32] This appeal is allowed; and the planning permission granted in this case is set aside. We make no order as to costs. For the record, this is a unanimous decision of the panel.

[33] By the concurrence of all parties, given at the start of the hearing of this appeal (and at the case management of the other related appeals), the decision in this appeal is binding on the following cases, namely:

(a) Appeal No LR/PP/6/2012;

(b) Appeal No LR/PP/7/2012;

(c) Appeal No LR/PP/8/2012;

(d) Appeal No LR/PP/9/2012;

(e) Appeal No LR/PP/10/2012;

(f) Appeal No LR/PP/12/2012;

(g) Appeal No LR/PP/13/2012; and

(h) Appeal No LR/PP/15/2012.

The above-listed eight appeals are thus similarly allowed, with no order as to

costs.

Appeals allowed; planning permission granted by respondent set aside with no order as to costs.

Reported by Dzulqarnain Ab Fatar